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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

REINA KARUNARATNE, Plaintiff and Appellant, v. QIAGEN, INC., Defendant and Respondent.	A154891 (San Mateo County Super. Ct. No. 17-CIV-02437)

Appellant Reina Karunaratne worked for Qiagen, Inc. After her termination, she filed a complaint against Qiagen, asserting various causes of action, including for sex discrimination in violation of the Fair Employment and Housing Act (FEHA). The trial court granted Qiagen's motion for summary judgment. Karunaratne appeals. She argues the court erred by excluding evidence of pretext and that there is a triable issue as to whether Qiagen's stated reason for her termination was pretextual. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

I. *Karunaratne's Employment, Maternity Leave, and Termination*

Qiagen, based in Hilden, Germany, is a provider of sample and assay technologies used for molecular diagnostics, applied testing, and academic and pharmaceutical research. One of Qiagen's business areas is "bioinformatics," which involves software that has biological applications.

In December 2014, Qiagen hired Karunaratne as a clinical marketing manager at its Redwood City, California facility. Qiagen employeed three bioinformatics marketing

employees in Redwood City, and seven others in Denmark. In the Redwood City office, Karunaratne and another employee reported to Antonio Montano, who, in turn, reported to Laura Furmanski.

In 2016, Karunaratne received a raise and was promoted to the position of senior clinical marketing manager. In or around September 2016, Karunaratne began maternity leave and she was scheduled to return to work in January 2017. Instead, she received a letter dated November 3, 2016 indicating her employment was to be terminated as of December 2, 2016 as the result of "organizational changes."

II. *Karunaratne's Lawsuit Against Qiagen*

In June 2017, Karunaratne filed a complaint against Qiagen asserting causes of action for: (1) sex discrimination in violation of the FEHA; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; (4) wrongful termination in violation of public policy; and (5) unfair business practices.

In February 2018, Qiagen moved for summary judgment arguing, among other things, that Karunaratne could not establish that Qiagen's reason for eliminating her position was a pretext for discrimination. According to Qiagen, it eliminated the position as part of a corporate reorganization, and she was one of 220 men and women across all business areas worldwide included in the company's reduction in force ("RIF").

Karunaratne opposed the motion arguing she was replaced by a male employee, other men in marketing were not terminated, and, prior to the RIF, male colleagues received advance notice and opportunities to transfer to other positions. Karunaratne argued that February 2018 job postings indicated Qiagen was seeking to fill her supposedly terminated position and that of another terminated marketing employee who was also on maternity leave at the time of the RIF.

In ruling on the motion, the court sustained evidentiary objections to the job postings and to Karunaratne's statements regarding them based on lack of foundation, lack of personal knowledge, and lack of authentication. The court granted Qiagen's motion finding Karunaratne "was terminated because her position was eliminated as a cost-cutting measure, and she was not replaced by a man. [Qiagen] executed a reduction

in force . . . . [Karunaratne's] position of Senior Clinical Marketing Manager was part of the reduction . . . . The decision to eliminate [Karunaratne's] position was based on the conclusion that the Bioinformatics group . . . 'was performing duties that were redundant of the work of employees in other, less expensive geographical areas.' . . . The reduction in force included men." The court found there was "no evidence that [Karunaratne's] status as a woman or as a woman on maternity leave was any part of the decision to terminate her employment."

The court entered judgment in favor of Qiagen and against Karunaratne. Karunaratne timely appeals.

DISCUSSION

Karunaratne contends the court erred or abused its discretion by excluding her "evidence of pretext—the post-termination job listings." With regard to her sex discrimination cause of action, she argues "there are circumstances suggesting [a] discriminatory motive," and she contends there is a triable issue as to whether the RIF was a pretext for discrimination. We disagree and affirm.

I. *Governing Law and Standard of Review*

California law prohibits an employer from terminating an employee because of her sex. (Gov. Code, § 12940, subd. (a).) Wrongful sex discrimination includes discrimination based on pregnancy. (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144.) This FEHA provision also provides the basis for a claim of wrongful termination in violation of public policy. (*Ibid.*)

In analyzing claims of discrimination under the FEHA, California courts use the three-stage, burden-shifting approach established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) First, the plaintiff must establish a prima facie case of discrimination. (*Guz*, at p. 354.) To do so, the plaintiff must provide evidence that: (1) she was a member of a protected class; (2) she was qualified for the position or was performing competently in

the position; (3) she suffered an adverse employment action, such as termination; and (4) some other circumstance suggests discriminatory motive. (*Id.* at p. 355.)

If the plaintiff makes a prima face case, then, second, "the burden shifts to the employer to rebut the presumption [of discrimination] by producing admissible evidence . . . its action was taken for a legitimate, nondiscriminatory reason." (*Guz, supra*, 24 Cal.4th at pp. 355–356.) If the employer does so, then, third, the plaintiff can attack the employer's proffered reasons as "pretexts for discrimination, or . . . offer any other evidence of discriminatory motive." (*Id.* at p. 356.)

In the context of summary judgment, "an employer may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case 'is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors.' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1181–1182.) "To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. [Citations.] In determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing her evidence while strictly scrutinizing defendant's." (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097–1098.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 361.)

II. *Karunaratne Fails to Raise a Triable Issue of Discrimination*

Here, in moving for summary judgment, Qiagen presented a legitimate reason for Karunaratne's termination: "she was one of more than 220 male and female . . . employees whose job positions were eliminated or restructured [in] a worldwide reduction in force." In opposing the motion, Karunaratne did not dispute that, in the fall of 2016, Qiagen underwent a companywide restructuring. Instead, Karunaratne argued her position was not eliminated as part of the RIF because, in

February 2018, she discovered job postings similar to the positions held by her and another female marketing employee. On appeal, Karunaratne relies primarily on these job postings to argue Qiagen's explanation for her termination was pretextual.

A. *The Job Postings*

Qiagen's first job posting was for the positon of "Clinical Informatics Marketing Manager—Redwood City." Karunaratne averred that "I saw this posted by [Qiagen] on LinkedIn in February, 2018. This describes the job duties I had at Qiagen and was my job from which Qiagen terminated me while I was out on maternity leave—which job Defendant Qiagen, in the instant motion, claims was 'eliminated.' " The second posting was for the position of "Discovery Informatics Marketing Manager." Karunaratne claimed this posting described the job duties of another employee whom "Qiagen terminated . . . while she was out on maternity leave—which job Defendant Qiagen, in the instant motion, claims was 'eliminated.' " In her deposition, Laura Furmanski, a senior vice-president of bioinformatics for Qiagen until November 2017, acknowledged the job postings appeared consistent with the range of activities Karunaratne and another employee performed for Qiagen.

Qiagen objected to the job postings and Karunaratne's statements regarding them, arguing she had no personal knowledge of their creation, or Qiagen's posting of them, or of Qiagen's plans regarding the positions. Qiagen objected that Karunaratne could only speculate regarding the similarities between the job postings and the former positions held by her and another employee, and that her statements lacked foundation. The court sustained these objections. The court also determined the two job postings lacked authentication.

B. *Considering the Job Postings, We Cannot Infer Qiagen Terminated Karunaratne Because She Was a Woman on Maternity Leave*

Assuming without deciding that the court should have overruled Qiagen's evidentiary objections to the job postings and to Karunaratne's statements about them, this evidence—and the evidence as a whole—does not permit a rational inference that Qiagen terminated Karunaratne because she was a woman on maternity leave.

Accordingly, the court did not err in its grant of summary judgment in favor of Qiagen. (*Guz, supra,* 24 Cal.4th at p. 361.)

Furmanski was the Qiagen employee responsible for restructuring the bioinformatics business area. She averred the company had completed several acquisitions "resulting in overlap among employee responsibilities and some inefficiencies that needed to be remediated, particularly in Marketing." A consulting firm recommended relocating various job categories to virtual " 'Centers of Excellence,' " including marketing. Around September 2016, Furmanksi and others began planning how to achieve savings of $800,000 in marketing and "a roughly $2 million savings outside of the marketing function."

In the bioinformatics group, "between 50 and 60 employees were laid off in Bangalore, India when that site was completely shut down . . . and approximately 10–12 employees in Denmark were also let go." Furmanski decided to eliminate seven bioinformatics positions in Redwood City, including two of the three marketing positions, leaving only Montano. Karunaratne's position "was eliminated as a result of the restructuring" and no one replaced her. "To the extent any of [Karunaratne's] prior job duties still exist, they have been diffused among a number of existing . . . employees, including other women."

In arguing this restructuring and RIF was a pretext for discrimination, Karunaratne relies on the job postings as evidence of "a continuing need for [her] skills and services." Karunaratne relies on federal cases, such as *Furr v. Seagate Technology, Inc.* (10th Cir. 1996) 82 F.3d 980, and she argues she "may show pretext by providing evidence that the position was not, in fact, eliminated." But liberally construing this evidence, the most we can infer is that the decision to terminate two Redwood City marketing positions in the fall of 2016 was a bad one that the company later reconsidered. When addressing claims of discrimination, the employer's "true reasons need not necessarily have been wise or correct. . . . [The] issue is discriminatory animus, not whether [the] employer's decision was 'wrong or mistaken,' or whether [the] employer is 'wise, shrewd, prudent, or competent.' " (*Guz, supra,* 24 Cal.4th at p. 358.)

Furmanski "was the sole individual responsible for making the decisions on the restructuring and layoffs of marketing personnel for bioinformatics." Furmanski eliminated seven bioinformatics positions in Redwood City because she determined the company could pay employees less money to perform the same work in other geographical areas. At least five of the seven former bioinformatics marketing employees in Denmark were moved into a new "Marketing Center of Excellence." Of the ten marketing employees that reported to Furmanski in both Redwood City and Demark, no men were "laid off within the marketing department, but the bioinformatics business area restructuring was much larger than the marketing changes, and there were men that were laid off as a part of that restructuring."

Furmanski left the company in November 2017, and she was not involved in the job postings. Nonetheless, prior to her departure, "there ha[d] been a number of challenges from a marketing point of view in getting the level of productivity and support that had been anticipated from the marketing [Center of Excellence]." Furmanksi knew that "marketing performance had suffered over the course of 2017," and she was not surprised to see that Qiagen posted jobs for marketing positions in Redwood City after she left the company. Based on this evidence, we can infer the company reconsidered its decision to terminate Karunaratne's position, but we simply cannot infer Qiagen terminated Karunaratne because she was a woman or pregnant. (*Furr v. Seagate Technology, Inc., supra*, 82 F.3d at p. 986 [evidence "suggesting that a decision, in hindsight, may not have been prudent is not evidence of improper motive"].)

C. *Karunaratne's Remaining Arguments Fail to Raise a Triable Issue*

In arguing Qiagen discriminated against her, Karunaratne points out she was an excellent employee. However, "an employee seeking to avoid summary judgment cannot simply rest on the prima facie showing, but must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual." (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112–1113.)

In an attempt to present such evidence, Karunaratne argues her former duties were transferred to a male employee who continued to work for Qiagen after the December 2016 RIF. But when Karunaratne's supervisor hired this temporary employee, he did not know Qiagen was planning a RIF. Montano requested a temporary employee because both of his "direct reports were going on maternity leave at around the same time." The temporary employee worked from October 2016 to January 2017 and "he has not done any work for [Qiagen] since then." It was always Montano's intention that this employee would be temporary. There is no evidence to support Karunaratne's suggestion that Qiagen sought to transfer her job duties to this male employee.

Without citing to the record, Karunaratne contends "no men who were in bioinformatics marketing were terminated." But we cannot focus exclusively on this subset of employees; Furmanski was responsible for restructuring the entire bioinformatics business area worldwide, and, in the course of doing so, she laid off male employees and retained an employee in Denmark who was eight months pregnant at the time.

Again without citing to the record, Karunaratne argues that "all the men under [Furmanski's] authority received preferential treatment, such as advanced notice of the RIF, opportunities to transfer to other positions, preservation of their jobs, and continued employment six months past the December RIF date." But the three male members of Furmanski's leadership team whose positions were terminated as part of the RIF received advance notice of it because Furmanski "did not want them to be included in the subsequent planning for the restructuring, since they were impacted by it." Two of these three individuals were from Denmark, and Danish law required Qiagen to employ them for six months after notification of their termination. The court ruled Karunaratne's statements regarding a third employee whom she claimed received preferential treatment were inadmissible because the statements were hearsay and speculative. On appeal, Karunaratne does not challenge these evidentiary rulings.

While both of the terminated bioinformatics marketing employees in Redwood City were on maternity leave at the time, in her deposition, Furmanski explained her

decision to retain Montano over these two other employees. We have no basis for inferring Furmanski terminated them because they were women on maternity leave. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580–1581 [inferences from the evidence must be reasonable and cannot "be based on mere possibility or flow from suspicion"].)

Karunaratne argues there are triable issues as to whether she was terminated in violation of public policy and as to whether Qiagen engaged in unfair competition, but these contentions are based on Karunaratne's claim that Qiagen engaged in sex discrimination in violation of the FEHA. Accordingly, these arguments fail for the reasons already explained. The court properly granted Qiagen's motion for summary judgment.

DISPOSITION

We affirm the order granting Qiagen's motion for summary judgment. Qiagen is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

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Jones, P.J.

WE CONCUR:

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Simons, J.

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Burns, J.

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